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No. 715

In the Supreme Court of the United States

OCTOBER TERM, 1959

CLEVELAND LESTER THOMPSON, JR., EDWARD LEE HASSCHEIDER, AND J. M. PROCTOR, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-24; R. 1852-1859) is reported at 272 F. 2d 919.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1959 (Pet. App. 26; R. 1861). A petition for rehearing (R. 1862-1864) was denied on January 22, 1960 (R. 1869). The petition for a writ of certiorari was filed on February 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly refused to order production of grand jury testimony sought by

defense counsel for possible impeachment of a government witness.

2. Whether the court erred in its charge in using the words "counsel" and "induce" (taken from the aider and abettor statute (18 U.S.C. 2)) without expressly defining them.

3. Whether the prosecutor's statement in his closing argument that he thought the verdict should be guilty constituted reversible error.

STATUTES INVOLVED

18 U.S.C. 656, 62 Stat. 729, provides:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> * * * * * *

18 U.S.C. 1005, 62 Stat. 750, provides:

> Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or
>
> * * * * *
>
> Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> * * * * *

STATEMENT

Petitioners were charged in count 1 of an indictment returned in the United States District Court for the Southern District of Texas with a conspiracy to violate 18 U.S.C. 656 and 18 U.S.C. 1005 (*supra*, pp. 2–3), by embezzlement of the funds of a federally-insured bank and making false entries in its books (R. 6–16). Counts 2, 4, and 6 charged the petitioners with substantive violations of 18 U.S.C. 656, and counts 3, 5, and 7 charged substantive violations of 18 U.S.C. 1005 (R. 16–22). Petitioners were convicted on all counts except 4 and 5, of which they

were acquitted (R. 1802–1803). Each was sentenced to two years' imprisonment on each of counts 1, 2, 3, 6, and 7, to run concurrently (R. 1806–1810). On appeal (R. 1811–1812, 1818–1819, 1826–1827), the convictions were affirmed (Pet. App. 26; R. 1861).

The general pattern of the petitioners' illegal operation, as proved by the government's evidence in regard to numerous sales of repossessed automobiles, is shown by the evidence under count 1, the conspiracy charge (R. 6–16). From May 1956 through July 1957, petitioner Thompson was employed at the Texas National Bank as an installment loan clerk to collect on loan accounts owned in part by this bank, which loans were secured by liens on automobiles. If the accounts became delinquent it was his duty to repossess the automobiles. The charge was that Thompson conspired with petitioners Proctor and Harschberger, automobile repossessers, to report to the bank lesser amounts of money received on such collections and repossessions than had actually been received, and to embezzle the difference.

Since petitioners make no challenge as to the sufficiency of the evidence, we limit our statement to the parts of the record involved in their contentions, in the same order in which they raise them.

1. Mrs. Maynor was a government witness who had worked as a skip tracer and general office worker for Harschberger and Proctor in January 1956. She left when they said that their automobile repossession company, then known as Coastal Auto Detective Bureau, at 910 Gray Street, was losing money (R. 314–316). She was re-hired by Harschberger and Proc-

tor shortly after July 4, 1956 (R. 317–318). A few days later, Harschberger, in the presence of Proctor, introduced her to Thompson, saying "This is Tommy, our silent partner" (R. 319). Thompson came to the office almost every day during the period when Mrs. Maynor knew that he was an employee of the Texas National Bank (R. 327, 364). Thompson instructed her how to make out Texas National Bank repossession invoices and sometimes helped in their preparation (R. 334–336).

Mrs. Maynor was asked to identify a number of checks which had already been introduced in evidence (R. 344–349). She identified a list of repossessions for the Texas National Bank she had drawn up from her records (R. 350–353). She testified that once Thompson told her he and Proctor were going to "have it out" with Harschberger, who was getting more than his share, and that she went home to avoid the unpleasantness. Subsequently, Thompson told her the matter had been adjusted (R. 367–369, 449–450).

On cross-examination, Mrs. Maynor testified that Proctor had directed her to tell F.B.I. Agent Parke what she knew and to help him in any way possible in his investigation (R. 383). She prepared for Parke a list of repossessed automobiles (R. 387–389) and delivered to him the office receipt book (R. 390). She gave a carbon copy of the list to Proctor (R. 389). She testified that she believed certain writing in Gov. Ex. 170, a repossession journal, was in Thompson's handwriting, but said she knew his signature and not his handwriting (R. 402–404). Throughout her cross-examination, she testified that

she could not be specific as to dates (*e.g.*, R. 389, 392, 448), such as when the argument occurred (R. 450).

After several re-direct and re-cross-examinations of the witness, petitioners requested that the court permit an inspection of the grand jury minutes of Mrs. Maynor's testimony to determine her veracity (R. 487–489). The court examined this testimony consisting of one and a half typewritten pages and stated that "there is not much difference in what she has testified to here and certainly not as extensively" (R. 517). The court denied the request for the grand jury testimony (R. 517–519).

2. During its final charge to the jury, the trial court instructed in part (R. 1768):

> Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal, and whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The court defined aiding and abetting (R. 1768). Shortly thereafter, the court read pertinent parts of the substantive statutes involved (18 U.S.C. 656 and 1005), and in the charge on the substantive counts used the pertinent language—"aid, abet, counsel, command, induce and procure" (R. 1770–1776). This was followed by a separate charge as to count 1, the conspiracy count (R. 1776–1782).

While the court was considering objections to the charge as given, this colloquy occurred (R. 1791–1792):

The COURT. I think the jury has been properly instructed on conspiracy.

Mr. GOLDING [counsel for Harschberger and Proctor]. To which we except. Also, named defendants except and object to the Court's charge because the jurors are not told what the terms "counsel", "induce", signify. Further, said named defendants object and except to the Court's charge because the jurors are not told how to use a belief that conspiracy existed as evidence in itself of the substance of crimes. Further, said named defendants except and object to the charge of the Court because there is no attempt to sketch differences between abetting, counseling and conspiring.

The COURT. Do you have a charge that you request be given?

Mr. GOLDING. No, sir; because I think they are fundamental. I think they are part of the——

The COURT. If you have a charge to request I will consider it.

Mr. GOLDING. I have none. * * *

3. Just before the closing of the government summation, the prosecutor stated (R. 1755):

I have put a lot of time in this case. I have worked hard on it, but even so I sincerely ask you to go out and render what you consider a proper verdict. I'll be frank with you. I think the verdict is guilty on all three on all counts. You may differ, but at least we are differing under an American process—under the American process. * * *

No defense objection was made at the time of this statement. After the jury had been excused to await

the court's final charge, this colloquy occurred (R. 1756–1757):

> Mr. GOLDING. Defendants Harshberger and Proctor object to the statement contained in the closing argument of the prosecutor, "I think the verdict should be guilty." Because same constitutes a personal expression and conviction of the prosecutor. This is an invasion of the province of the jury.
>
> * * * * *
>
> The COURT. What do you request? What right do you claim for your client by virtue of it? Do you claim a mistrial or acquittal or what?
>
> Mr. GOLDING. A mistrial, Your Honor. I do not think the prosecutor has any right, any more than I would, to express the personal belief of the guilt of the defendants.
>
> The COURT. Well, I think it is stated as argument and I will so instruct the jury if you wish.
>
> Mr. GOLDING. No, sir; I think I will just stand on my exception to the ruling of the Court.

ARGUMENT

1. Contrary to petitioners' contention (Pet. 7–10), the trial court did not err in refusing to produce the grand jury testimony of government witness Mrs. Maynor, for use by defense counsel in further cross-examination of her at the trial. Petitioners did not consider the point important enough to raise on appeal until their petition for rehearing in the court of appeals.

The decision of this Court in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398, establishes that grand jury minutes are not subject to production as of right on demand under 18 U.S.C. 3500, but may be ordered produced, in the discretion of the trial court, only when there is particularized need therefor. Here, petitioners showed no such particularized need. They had extensively cross-examined the witness before demand was made. The court examined the one and a half pages of grand jury minutes which represented her testimony and stated that it was not essentially different from her testimony at the trial but was much less extensive.

Mrs. Maynor was not the key government witness. The government called numerous witnesses whose cars had been repossessed and who each testified that his car was in better condition than was reflected on the repossession memoranda of the bank.[1] Seven wholesalers testified to the prices they had paid for cars.[2] In most instances, their testimony was supported by documentary evidence of their checks and records. Government's Exhibit 170 was a bank record under the control of petitioner Thompson which showed the lesser amounts received by the bank for the repossessed cars. That notations in Government's Exhibit 170 were in part in Thompson's handwriting was proved by witnesses other than Mrs. Maynor and admitted by Thompson himself (see R. 1366–1368).

The only real significance of Mrs. Maynor's testimony was to the effect that Thompson considered

[1] R. 292, 501, 659, 677, 701, 812, 830, 972, 984, 994.

[2] R. 549, 727, 1016, 736, 763, 879, 864, 938.

himself and was treated as a partner by the other two. There was also other testimony as to this. Government witness, Mrs. Jeffries, testified that, when she was opening a bank account for Coastal Auto Recovery Bureau for Proctor and Harschberger, the latter told her that Thompson was a silent partner. She then crossed out his name and wrote in "silent partner" on the card (R. 263–268). Government witness Williams testified that Harschberger told him that Thompson had a one-third partnership interest in the company with Proctor and Harschberger (R. 549, 560, 605). Moreover, Mrs. Maynor's testimony as to Thompson's participation was not vague, except as to specific dates—hardly a basis for inferring unreliability.

Considering the extensive documentary proof in this case showing clearly the fact that money on repossessed cars was not turned over to the bank, petitioners' unsupported statement (set forth as a quotation without attribution, see Pet. 7) that the jury could not have convicted unless it believed Mrs. Maynor is wholly unfounded.

2. There was no error by reason of the trial court's failure to define the terms "counsel" and "induce," as used in the charge in relation to the substantive counts (see Pet. 10–12).

"Counsel" and "induce" are ordinary words used by the average person in everyday conversation, and there is no reason to believe that the jurors did not understand their meaning. There is no requirement that a court shall explicitly define words which are not obscure, ambiguous, or technical, and can reason-

ably be expected to be within the comprehension of the average layman. Cf. *Wheeler* v. *United States*, 190 F. 2d 663 (C.A.D.C.); *Byas* v. *United States*, 182 F. 2d 94, 96–97 (C.A.D.C.); *Banks* v. *United States*, 223 F. 2d 884, 888–889 (C.A. 8), certiorari denied, 350 U.S. 986; *Shreve* v. *United States*, 103 F. 2d 796, 812 (C.A. 9), certiorari denied, 308 U.S. 570. Significantly, while objecting to the failure to define the terms, counsel refused to submit a proposed instruction (R. 1791–1792; *supra*, pp. 6–7).

Moreover, the judge clearly separated the charge on aiding, abetting, counseling, etc., relating solely to the substantive counts (R. 1770–1776) from that relating to the conspiracy charge (R. 1776–1782). The jurors were instructed that a separate offense was charged against each defendant in each count of the indictment, and that each offense and the evidence applicable to it should be considered separately (R. 1785–1786). The conspiracy count, without more, can support the sentences imposed.

3. There is likewise no merit to petitioners' final contention that a mistrial should have been granted because of the prosecutor's statement that the verdict should be guilty (Pet. 13–15). Only this one isolated part of the prosecution's closing argument is attacked, *i.e.*, "I'll be frank with you, I think the verdict is guilty on all three on all counts" (R. 1755). As Judge Rives pointed out (Pet. 25), the argument as a whole (see R. 1648–1687, 1736–1756) contained a temperate analysis of the evidence. There were no foul blows or impassioned pleas not supported by the record, such as were denounced in *Berger* v.

United States, 295 U.S. 78. In our view, even in its immediate context the challenged remark was not improper, since the preceding and following sentences advised the jurors to return what they considered a proper verdict, although they thereby disagreed with the government's position. There was nothing in the challenged argument to mislead the jury into a belief that the prosecutor was testifying or that he had personal knowledge as to other evidence not introduced in the record.[1] Accordingly, it was permissible in the circumstances here for the prosecutor to express his individual belief in the petitioners' guilt. Cf. *Henderson* v. *United States*, 218 F. 2d 14, 19 (C.A. 6), certiorari denied, 349 U.S. 920; *Schmidt* v. *United States*, 237 F. 2d 542, 543 (C.A. 8); *United States* v. *Holt*, 108 F. 2d 365, 370 (C.A. 7), certiorari denied, 309 U.S. 672.

Even if it be assumed that the prosecutor's challenged remark was erroneous, it was at most a "minor aberration" in a long trial, not warranting reversal. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239–240; *United States* v. *Pietch*, 110 F. 2d 817, 822 (C.A. 10), certiorari denied, 310 U.S. 648. As the court below pointed out, rejection by defense counsel of the court's offer to instruct that the specific remark was made as argument (*supra*, p. 8) showed "that he was more interested in preserving the excep-

[1] In *United States* v. *Tateana*, 466 F. 2d 524, 527 (C.A. 2), relied upon by petitioner (Pet. 15), unlike the situation here, the improper statement in the prosecutor's argument was a "seriously injurious reference to incriminating matter not in the record * * *."

tion intact than in obtaining relief [and] rendered the error, if any, completely harmless" (Pet. App. 22). In its final charge, the trial court instructed that "Statements and arguments of counsel are not evidence in the case * * *" (R. 1763); "You are to consider only the evidence in the case" (R. 1764); and "Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case" (R. 1787). The jury was therefore made aware that the prosecutor's statement was argument and not evidential testimony.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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